

**MINUTES**

**Supreme Court's Advisory Committee  
on the Rules of Appellate Procedure**

Administrative Office of the Courts  
450 South State Street  
Salt Lake City, Utah 84114

May 26, 2010 - 12:00 p.m.

**ATTENDEES**

Tawni Anderson  
Paul Burke  
Marian Decker  
Jennifer Gowans  
Larry Jenkins  
Judge Gregory Orme  
Brian Pattison  
Clark Sabey  
Judge Kate Toomey  
Judge Fred Voros

**EXCUSED**

Joan Watt

**Staff**

Brent Johnson

**I. WELCOME AND APPROVAL OF MINUTES**

Judge Fred Voros welcomed the committee members to the meeting. Larry Jenkins moved to approve the minutes from the last meeting. Clark Sabey seconded the motion. The motion carried unanimously.

**II. SCOPE OF REPRESENTATION**

Joan Watt was not at the meeting. The issue was continued until the next meeting.

**III. WORD COUNT RULE**

Larry Jenkins suggested that it is time for the committee to revisit the possibility of a word count rule. The committee agreed. Mr. Jenkins stated that he will bring a proposal to the next meeting.

#### **IV. RULE 24**

Judge Fred Voros presented proposed changes to Rule 24. Judge Voros stated that the proposal suggests to attorneys to use discretion when referencing non-parties if privacy is an issue. Paul Burke suggested the use of the word “protected” instead of the word “anonymity.” The committee agreed with this suggestion. Judge Voros also suggested that the phrase “may be” should be used in the rule rather than the word “mandated.” The committee members agreed with the suggestion. Judge Voros then asked the committee members for a vote on the rule. The members unanimously approved the rule.

#### **V. RULE 5**

Judge Gregory Orme presented a proposed change to Rule 5. Judge Orme stated that the change had been suggested by central staff attorneys. Judge Orme stated that the proposed change is to require a petitioner to include in a petition for interlocutory appeal the date that the matter is scheduled for trial. Judge Orme stated that this would be helpful information for the court, because if the trial will happen soon, it might affect the court’s decision on whether to grant the petition. Judge Voros stated that the only issue he has is that the language presupposes that there is a trial date. Judge Orme suggested including the phrase “if any.” The committee members agreed with the suggestion. Paul Burke then moved to approve the rule. Judge Orme seconded the motion. The motion carried unanimously.

#### **VI. E-FILING SUBCOMMITTEE**

Staff reminded the committee that Matty Branch had suggested forming a subcommittee to review the appellate rules in anticipation of e-filing being implemented. Tawni Anderson asked when that would occur. Judge Kate Toomey stated that the trial courts have started e-filing but they have experienced some problems. Judge Toomey stated that some of the problems relate to having both paper copies and electronic documents in the same file. Judge Toomey stated that she often prefers to look at paper documents to compare things side-by-side. Judge Voros noted that Matty had suggested certain court positions be on the committee. The committee decided that Judge Toomey will be the chair and the members will include Clark Sabey, Brian Pattison, a clerical representative, an individual from the IT department, and possibly a staff attorney from the Court of Appeals.

## **VII. OTHER BUSINESS**

Judge Voros reminded the committee members that Joan Watt suggested the committee form a Rule 23B subcommittee to determine whether the rule should be repealed. Judge Voros stated that the Task Force on Appellate Representation has been looking at effective appellate representation and one of the proposals is to eliminate the rule. Judge Voros stated that the task force will be recommending that the counties execute separate contracts for trial attorneys and appellate attorneys. Judge Voros stated that Rule 23B actions are often difficult for appellate attorneys. Judge Voros stated that the reason for Rule 23B is because at the federal level there is no right to counsel and the appellate procedure committee wanted to make certain that any ineffective assistance of counsel claims were addressed while a defendant is still represented. Judge Voros stated that Ms. Watt had suggested a subcommittee of her, Judge Voros, Marian Decker, and Jennifer Gowans. Judge Voros stated that most 23B motions are denied and those that are remanded to the trial court for a hearing rarely result in a finding of ineffective assistance.

Paul Burke asked whether there would be an avenue for defendants to raise ineffective assistance claims if Rule 23B is repealed. Marian Decker stated that it could be raised on habeas. Judge Voros stated that defendants could still raise the issue on appeal but the record on appeal would not include facts related to such allegations as failure to call an alibi witness. Jennifer Gowans stated that, in post-conviction cases, defendants are often very limited in the arguments that can be made and perhaps the defendant could only raise ineffective assistance of appellate counsel.

Judge Orme noted that Rule 23B is unique to Utah. Judge Orme stated that it is very unusual to make a new record to supplement an existing record. Ms. Gowans stated that there is an important interplay between Rule 23B and post-conviction cases and if Rule 23B is repealed there may be a need to change post-conviction rules. Judge Voros stated that the subcommittee will look at all these issues. Mr. Sabey stated that if Rule 23B is repealed it might moot all the case law which states that ineffective assistance claims generally cannot be made in post-conviction cases.

Judge Voros asked whether anyone else wanted to be on the subcommittee. Judge Toomey stated that she would participate if the committee believes that a district court perspective would be helpful.

## **VIII. ADJOURN**

The committee scheduled its next meeting for July 7, 2010. The committee adjourned at 1:30 p.m.